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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1124

JACK NEILSON, INC.,

Petitioner,

versus

TUG PEGGY, ET AL.
TUG MARGARET, ET AL.
TUG CARMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE O'DOWD
3329 Gen. Meyer Street
New Orleans, La. 70114
Attorney for Edward J. Buras and
James J. Buras, Respondents

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PETITION FOR CERTIORARI

a.

This matter has been reported as follows: In the United States Court of Appeals for the Fifth Circuit #27823, Jack Neilson Inc., vs. Tug Peggy, Tug Margaret, Tug Carmen, et al (opinions annexed as appendix 1 and 2)

b.

(i) the judgment in the above matter was originally written June 30, 1970; (annexed as appendix 1).

(ii) the petition for rehearing was denied September 22, 1970, (annexed as appendix 2;) and the court

granted a stay of its mandate on October 6, 1970 until November 6, 1970, and on November 16, 1970 it granted a further stay up to and including December 21, 1970.

(iii) it is urged that under rule 19, of this Honorable court this court has jurisdiction to review the 5th Circuit Court of Appeals decision on federal question in a way to conflict with the applicable decisions of this Honorable Court; viz, the rule of the Ada case.'

c.

The question for review is whether or not the Ada Case[1] is the law of admiralty concerning lease-purchase agreements; and whether or not such contracts should be read and interpreted within the basis laws of the state wherein they are written, or if there is some federalisia law applicable to such contracts.

d.

U. S. Constitution Article III, Sec. 2: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction.

e.

The cases before this court concern three identically written contracts, between identical parties; but concerning three tugs. (a copy of one contract being appendix 3).

There were three identical worded suits filed in 1966 demanding the purchase price of the vessels, less credits, etc. (copy of one of the original suits being appendix 4).

[1] 250 F. 194.

Exceptions to the courts jurisdiction were filed, and on July 18, 1968 the court granted the defendants motion. (copy being appendix 5).

On October 23, 1968 the district court held the July 18, 1968 rule in abeyance and granted plaintiff leave to file an amended complaint. (annexed as appendix 6).

An amended complaint was filed, to which a further exception to the courts jurisdiction was filed and overruled by the court (annexed as appendix 7), writs being allowed to the 5th Circuit Court of Appeals.

6.

(not applicable)

8.

see d above.

b.

If the Ada case[2] is the law of admiralty, then the contracts between the parties must be read and interpreted within the basic laws of the State of Louisiana wherein they were written; and as such they were purchase agreements between the parties; all rights and obligations between the parties being complete and absolute when the contracts were originally signed.

The appellate court cited no state case law upon the subject contracts in question although there is an abundance of cases upon the subject.

cf. Collector of Revenue v. F & H Equipt. Co., 119 So 2d 631, General Talking Pictures Co. vs. Pine Tree Amusement Co., 156 So. 812.

The Louisiana case law holds that agreements having

[2] 250 F 194.

characteristics common to both sale and lease (a charter being a lease of a vessel), but wherein grantee becomes liable for the price, though title is retained by grantor, will not be recognized as written but will be considered as a 'sale', pure and simple. (collector of Revenue v. F & H Equipt. Co., 119 So. 2d 631).

The ultimate legal effect of the court dividing the contract between the parties into two parts; the charter portion thereof and an agreement to purchase portion, is to allow the plaintiff greater legal rights under federalisia law of contract than they would have had under State law of contract.

It is set out in the original complaints that "the defendants voluntarily turned the vessels back", and under the laws and decisions of the State of Louisiana such a turning back amounts to a "dation en paiemente".[3] which would be legal satisfaction of any indebtedness. Under the decision of the appellate court such plea could not be urged. There is the further detriment to defendants of not receiving credit against the vessels sale price if plaintiff had sued in state court upon the purchase. The reason for this is that under state decisions the plaintiff would sue for his purchase price and recognition of his vendors lien privileges, then obtain judgment with recognition of his privilege upon the vessels, which must then be seized and sold credit against the sales price being allowed to defendants.

It is submitted that the rule of the Ada Case[4] is sound in its distinction between federal and state jurisdictions, allowing to the federal courts rule over the seas

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[3] La. Civil Code Art. 2655. — The giving in payment is an act by which a debtor gives a thing to the creditor, who is willing to receive it, in payment of a sum which is due.

[4] 250 F 194.

and to the state court rule over its subjects and their contracts. The Ciudad de la Habana Case[5] is simply not analoguous to the case at bar except in its obiter dictum, as the predicate for the decision was the fact of their being a lack of relations between the United States and Cuba. The Texas & New Orleans Barge Line Inc., vs. Tug Patsy H[6] simply contained an option allowing a purchase at the termination of the charter.

I believe there is a legal distinction between an option to purchase as contained in a contract of charter, and a contract agreeing to purchase couched in terms of a charter option.

WHEREFORE APPLICANTS PRAY: That after due consideration, this Honorable Court grant certiorari upon this matter; and

That in due course of law the exception to the jurisdiction of the federal court be maintained; and

That defendants be formally dismissed; and

For general and equitable relief.

EDWARD J. BURAS

JAMES J. BURAS

GEORGE O'DOWD,
Attorney for Applicants
3329 General Meyer Ave.
New Orleans, La. 70114

[5] 181 F Supp 301.
[6] 279 F. Supp 697.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Writ for Certiorari have been served on opposing counsel, this

..... day of December, 1970.

.....

GEORGE O'DOWD

APPENDIX 1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27823

JACK NEILSON, INC.,
Petitioner-Appellant,

versus

TUG PEGGY, ET AL, TUG MARGARET, ET AL,
TUG CARMEN, ET AL,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 30, 1970)

ON PETITION FOR REHEARING

Before TUTTLE, WISDOM, and GOLDBERG, Circuit Judges.

WISDOM, Circuit Judge: The Court on May 5, 1970, dismissed this interlocutory appeal under Fed. R. App. P. Rule 5(a). The petition for permission to appeal appeared to have been filed two days after the expiration of the ten-day period allowed for filing such

petitions. The Court has now learned that the tenth day fell on Sunday, March 31, 1969, and that appellant's counsel timely filed his petition with the Clerk of Court shortly before the close of business on Monday, April 1, 1969, but a newly employed clerk mistakenly waited until April 2, 1969, to mark the petition "Filed". Accordingly, we grant the petition for a rehearing, vacate our order of May 5, 1970, and allow the appeal from the interlocutory order.

• • •

The owner of three vessels seeks to recover unpaid monthly rentals for the lease of the vessels under a lease-purchase agreement cast in the form of a bareboat charter. We hold that the charter provisions of the contract are maritime in nature, are severable, and within the admiralty jurisdiction of the district court.

In April 1965 Apache Towing, Inc., entered into three contracts with Jack Neilson, Inc., covering the lease for sixty months and purchase of three tugboats. The contracts are entitled "Bareboat Charter Party and Option". The terms of the three contracts are virtually identical, except that the monthly rental ($800, $667, and $533 for the Peggy, the Carmen, and the Margaret respectively) and the stipulated purchase price ($60,000, $50,000, and $40,000 respectively) are different for each vessel. The terms and the conditions are characteristic of a typical bareboat charter. Each contract, however, contains an option to purchase the vessel during the charter period, "with credit against above purchase price and 'add-on' interest thereon accruing at six percent per annum for all charter hire

previously paid." The contract also provides: "At the termination of the sixty month period, The Charterer agrees to purchase the vessel and the Owner agrees to sell said Vessel to the Charterer for cash" $30,000, $25,000, $20,000 for the Peggy, the Carmen, and the Margaret respectively. Except as to the stipulated amount, each contract provides that:

> If Charterer fails to pay any charter hire or other amount herein provided after the same is due and payable, or if Charterer fails to observe, keep or perform any other provisions of this charter party required to be observed, kept or performed by Charterer, then upon written notice of said default Charterer is to have (30) thirty days from receipt of said notice to purchase said Vessel for $50,000.00 plus six (6%) per cent interest per annum accrued thereon up to the time of the purchase. The full charter hire previously paid as of the date of the written notice shall be applied toward the purchase price and accumulated interest."

As early as December 1966, Apache was three months in arrears on the charter hire. The charterer then voluntarily returned the ships to their owner.

In May 1966 Neilson, as owner of the Tug "Peggy", brought a libel and complaint against Apache and others[1] for "breach of contract, civil and maritime". Neil-

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[1]Cimmeron Towing, Inc., Henry A. Billiot, d/b/a Marco Towing Co. and two guarantors, Edward L. Burns, Sr. and James J. Burns.

son sued for the full amount of the purchase price of $80,000 less $4000, the amount previously paid by Apache. In addition, Neilson asked for $7500 for the cost of repairs made necessary by damage to the Tug Peggy during Apache's operation of the vessel. Neilson brought similar actions to recover the purchase price of $50,000 for the Carmen and $40,000 for the Margaret. In these actions too the complainant asked for costs of repairs to the vessels. The cases were consolidated in the district court.

The defendants answered, asserting, among other defenses, that the "libellant failed to provide a seaworthy vessel at the inception of the charter". Shortly thereafter, the defendants filed an exception to the jurisdiction on the ground that the subject matter of the dispute was a non-maritime ship-purchase agreement. The district court upheld the exception but granted the plaintiff leave to file a supplemental amended complaint.

The amended complaint bears little resemblance to the original complaint. It rests entirely on those terms of the parties' agreements which relate to chartering the vessels. Neilson now avers that the contract was a bareboat charter party; that Apache failed to pay the monthly charter hire; that Neilson is entitled to sixty months of rentals on each of the three vessels, less a deduction for the amounts the charterer previously paid as charter hire. The total claim now asserted for the charter payments is $119,920 as against the original claim of $150,000 for the purchase price subject to a deduction for the charter rentals paid.

Benedict broadly states the generally accepted rule governing the extent of admiralty jurisdiction over contracts.

> The celebrated and learned commentators upon the maritime codes and other writers of textbooks upon the maritime law, such as Selden, Grotius, Stracha, Bynkershoek, Valin, Stypmanus, Loccenius, Casa Regis, Emerigon, Kuricke, Pothier, Roccus, Malynes, Cleirac, Boucher, Boulay Paty, Pardessus, Vennius, Lubeck, Targa and many others, whose works have been the universally known and everywhere conceded evidence of the admiralty and maritime law, have not adopted any narrow rule respecting the extent of the admiralty jurisdiction. The question, whether the cause of action arose within the limits of a country, or in a harbor, or was founded upon an instrument, sealed or unsealed, or made on shore or on shipboard, in a usual or unusual form, appears never to have entered the minds of those legislators and jurists. They have always looked solely to the maritime nature and character of the transactions, which cannot depend upon any such considerations, and they treat of all cases of service, contract, tort or accident relating to ships, shipping and maritime commerce. It is now settled law in the United States that the jurisdiction of admiralty in matters of contract depends upon the subject-matter, *i.e.*, the nature and character of the contract, and that the English rule which

> conceded jurisdiction (with few exceptions) only to contracts made and to be performed upon navigable waters, is inadmissible, the true criterion being that the contract has reference to maritime service or maritime transactions.

1 Benedict, The Law of American Admiralty, § 62, p. 127 (6th Ed. 1940).

Unfortunately, "when a high-level abstraction such as 'maritime' has to be used to draw a line between concrete cases", the "test of maritime subject-matter" is difficult to apply.[2] Not infrequently the test has resulted in anomalies. Suits or contracts for the building and sale of vessels "might be thought to be included, but actually are not" maritime in nature.[3] Yet ship mortgages are within admiralty jurisdiction.[4]

Here, no doubt the owner of the three tugs hoped that the charterer would exercise the option to purchase during the charter period. No doubt the owner felt comfortable about the charterer's agreement to purchase at the expiration of the charter. But the subject of each contract was a vessel that might be afloat and

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[2]Gilmore and Black, The Law of Admiralty, p. 25 (1957).
[3]Id. p. 26.
[4]See Detroit Trust Co. v. The Thomas Barlum, 1934, 293 U.S. 21, 55 S.Ct. 31, 79 L.Ed. 176, sustaining the constitutionality of The Ship Mortgage Act, 41 Stat. 1000 (1920), 46 U.S.C. § 921 et seq. (1946). See also Morrison, The Constitutionality of the Ship Mortgage Act of 1920, 44 Yale L. J. 16 (1934).

in the control of the charterer for five years. The contract was drawn therefore with maritime problems in mind, particularly problems relating to bareboat charters. No one can possibly read the complicated contract sued on in this case and arrive at any other conclusion than that the dominant provisions relate to operation of a vessel by a charterer and an admiralty court, aided by procters, is the best qualified tribunal to undertake the task of construing the contracts.[8]

The defendants' argument against the court's taking jurisdiction comes from an undiscriminating applica-

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[8]The policy argument was well expressed by Judge Rouzel L. Thomsen in Flota Maritima Browning v. The Ciudad de la Habana, D.C. Md. 1960, 181 F.Supp. 301, 309:

> There are valid arguments in favor of the proposition that admiralty courts should take jurisdiction over claims arising out of contracts for the sale of a ship, though not for specific performance of contracts of sale, and even stronger arguments for taking jurisdiction over claims arising out of lease-purchase contracts. For example, admiralty courts are generally familiar with the subject matter of such contracts and with the related questions which frequently arise; admiralty procedure is usually more flexible and speedier than state court procedure in comparable cases; the admiralty rules with respect to attachment, release on stipulation, and the like, are uniform throughout the country and are well known to admiralty lawyers, whereas the attachment laws and practices of the several states are very different and are ill-adapted to cases involving vessels engaged in navigation, where seamen, cargo owners and others may have all sorts of conflicting claims and liens, which admiralty courts and the admiralty bar are accustomed to handle. ¶ The traditional subject matter test — whether the contract relates to the navigation, business or commerce of the sea — would seem to be met by contracts for the sale of a ship. Even the more restrictive statement of the test — whether the contract concerns transportation by sea, or is one of navigation and commerce within navigable waters — is met by the lease provisions of the typical lease-purchase contract, including the contracts involved in this case.

tion of the petrified rule that ship-sale contracts are not within admiralty jurisdiction. "This seemingly well-settled rule arose as an analogy to a case[6] which is inconsistent with basic principles governing the admiralty jurisdiction of United States courts. Even today the precedent for such a rule is scant." Note, Admiralty Jurisdiction and Ship-Sale Contracts, 6 Stan. L. Rev. 540 (1954).[7]

The first and most influential case for the proposition that ship-sale contracts are outside admiralty jurisdiction was *The Ada*, 2 Cir. 1918, 250 Fed. 194. In *The Ada* the charterer had an option to purchase for the sum specified in the charter party as the hire. The owner withdrew the vessel, and the charterer filed a libel in rem against the vessel and in personam against the owner to recover damages sustained by the charterer, both for breach of the charter and for breach of the contract of sale. The owner filed exceptions to the libel, arguing that the damages claimed arose from a breach of contract for the sale of the vessel, a cause of action not within the admiralty jurisdiction.

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[6]People's Ferry Co. v. Beers, 1857, 20 How. 393, held that "shipbuilding contracts are not within admiralty jurisdiction. But the Court emphasized that the contract was "made on land, to be performed on land".

[7]This note is an important commentary on the origin of the ship-sale rule and its history in the courts. The note was relied on heavily in Floyd Maritima Browning v. The Ciudad de la Habana both in the district court, D.C. Md. 1960, 181 F.Supp. 301, and in the Court of Appeals, 4 Cir. 1966, 363 F.2d 733. We too rely heavily on it.

The charter was only for six months; the purchase-price was the same as the total charter payments; the so-called charterer had notified the owner that it would purchase the vessel and had tendered the purchase-price. The language of the opinion clearly shows the court's intention to limit the effect of the decision:

> If this charter had provided for the use of the vessel for six months at a specified charter hire, and had given the charterer the option thereafter to purchase at a fixed price, there would be two separate causes of action; the former justiciable either in admiralty or at law and the latter at law only. But the right to use and the right to buy the steamer in this case were inseparably connected. The price for the use for six months was the same as the price for the absolute ownership. Obviously no one would fail to exercise such an option. All the provisions of the agreement show that the main intention was a contract of sale.

The Ada, 2 Cir. 1918, 250 Fed. 194 at 195-196.

In *Floyd Maritima Browning v. The Ciudad de la Habana*, D.C. Md. 1960, 181 F. Supp. 201, the lease-purchase contracts provided for long term bareboat chartering (as in the case here under review) — fifteen years under one contract seven years under the other with certain options to the lessee and to the owner. Chief Judge Thomsen held:

> If the several contracts had run to nearly their full course, the lessee would undoubtedly have exercised its option to purchase, because the payments for rental or charter-hire would have nearly equalled the purchase price. But many events might have occurred in the early part of the term to cause the lessee to terminate the contract. ¶ *The contracts in the instant case are therefore different from the contract in The Ada, which ran for only six months and gave no similar termination option to the lessee.* Yet two experienced admiralty judges, Judge Smith and Judge Hand, held in that case that the charter provisions of the lease-purchase contract were within the admiralty jurisdiction, although they were reversed by the Second Circuit, for different reasons stated by the several judges...." (Emphasis added.)

181 F. Supp. at 309-310. Judge Thomsen observed with regard to *The Ada:*

> The cause of action for breach of the charter provisions came on [in the district court] before Judge Learned Hand, sitting in admiralty. Judge Hand found that the owner had wrongfully withdrawn the vessel and was *liable to the charterer for the loss sustained by it as charterer,* although the damages for breach of the sale provisions were not recoverable in admiralty. 239 F. at page 372, 250 F. at page 195. The Court of Appeals reversed, on the ground that the District Court lacked juris-

> diction. Each of the appellate judges filed an opinion. Without the citation of any authority whatever, they agreed that a contract for the sale of a ship is not a maritime contract; they seemed to agree, each for different reasons, that the *charter provisions and the sale provisions were inseparable*, and that the contract should be treated as a contract of sale. (Emphasis added.)

181 F. Supp. at page 308.

When *The Ciudad de la Habana* reached the Court of Appeals for the Fourth Circuit that Court agreed with Judge Thomsen "largely for the reasons expressed by him in a thoughtful opinion". *Flota Maritime Browning de Cuba, Sociedad Anonima v. Snobl*, 1966, 363 F.2d 733, 735. In a careful analysis of *The Ada*, Chief Judge Haynsworth went beyond the district court's opinion, however, and added:

> From the three separate opinions filed by the court [in The Ada], however, it is apparent that each judge considered the agreement primarily one for the sale of the vessel. The *lease agreement there was limited to a period of six months. . . . At the time of the breach of the contract, the charterer* [in *The Ada*] *had in fact exercised his option to purchase, thereby converting the agreement into a contract of sale.* ¶ *Under other lease-purchase agreements, however, claims may arise which are clearly founded upon the lease provisions and*

> *which would be within admiralty jurisdiction.* The primary opinion in The Ada clearly recognized this possibility. ¶ In this case the agreements were to extend for *periods of seven and fifteen years.* The economic compulsion to exercise the purchase option is clearly not so great where the cost of use for a long period approximates purchase price as it is where the cost of use for six months is the same as the purchase price. Nor is there an indication that the rentals here were so unreasonably high as to suggest a disguised sale *Although the contract could have been converted into a sale at the option of either party, up to the time of its termination it had not been.* Unlike the contract in The Ada, at the time the libel was filed, the parties had operated only under the lease provisions and *the purchase-sale options were unexercised. The character of the contract was thus fixed, as between the parties, as a charter.* (Emphasis added.)

363 F.2d 733, at 736. The underscored words in this opinion show that the case under review by this Court falls within the principles expressed in *The Ciudad de la Habana* rather than within a wooden application of the supposed *Ada* rule.

Aside from *The Ciudad de la Habana*, which distinguished *The Ada*, there is very little direct authority. *Grands Banks Fishery Co. v. Styron (The Caracara)*, S.D. Me. 1953, 114 F. Supp. 1, followed *The Ada*, but in that case the plaintiff had purchased a fishing vessel

then at sea and had paid the full purchase price. Upon the boat's arrival, the plaintiff discovered major defects and brought a libel for breach of warranty in a federal district court. There was no charter party involved. Even so, Judge Thomsen, discussing *The Caracara* in *Ciudad de la Habana*, pointed out: "Since it is agreed that admiralty has jurisdiction of contracts for repair of a vessel, and repairs often give rise to a maritime lien, the decision in *The Caracara* seems particularly anomalous". 181 F. Supp. at 308, n. 10.

In *Texas and New Orleans Barge Line, Inc. v. Tug Patsy H*, E.D. La. 1968, 279 F. Supp. 697 the district court had before it a lease-purchase contract in the form of a charter party that was similar to the contracts sued on in the case before this Court. The libellant, (Jack Neilson) as the owner of the Tug Patsy H entered into a bareboat charter party with Nagel Towing Co. to lease the vessel *for forty-eight months*. The charter contained a provision allowing Nagel Towing Co. to purchase the tug at a stipulated price at the termination of the charter period. The respondents argued that because of this provision the contract was "not a charter agreement at all but rather amounted to a sale of the tug" governed by Louisiana law; that under Louisiana law it would be against public policy to allow the libellant to recover for rentals owed at the time the vessel was surrendered to the owner. The defendants make the same argument here. Chief Judge West gave this argument short shrift: "The Court finds no merit to these contentions. In a charter party the parties may contract as they choose, *J. B. Effenson Co. v. Three Bays Corp.*, 5 Cir. 1956, 238 F.2d 611, and

they are of course bound by the contract as written .... This charter party was a bareboat rental of the Tug Patsy H for a specified time at a specified price and nothing else. It was not a sale". 279 F. Supp. at 698.

Effenson, cited by Judge West, was a civil action upon a charter party. The court held that rights under the charter party were covered by maritime law and not the common law or statutory law of a state. To allow a plaintiff to elect a state forum would defeat the uniformity the Constitution requires in maritime law. The case is not without bearing here. The constitutional objective of uniformity and the intentions of the parties would surely be defeated if the Neilson-Apache charter parties were subject to the Louisiana Deficiency Judge Act, LRS 13-4106, or to Louisiana public policies and decisions governing land-based conventional obligations, entertain a bill or libel for specific performance ... The jurisdiction embraces all maritime contracts, torts; injuries or offenses and *it depends upon the nature of the contract*, and is limited to contracts, claims, claims and services *purely maritime* and touching rights and duties appertaining to commerce and navigation". (Emphasis added.) *Rea v. The Eclipse*, 1890, 135 U.S. 599, 608, 10 S.Ct. 873, 34 L.Ed. 269. But, as pointed out in *The Cuidad de la Habana*, "While the principle is one of general validity when the non-maritime elements are substantial and inseparable from the maritime elements, it has long been recognized that where the maritime elements of a contract are susceptible to separate adjudication admiralty jurisdiction may be exercised to that extent." 363 F.2d at 735. The Fourth Circuit cited *Compagnie Francaise*

de Navigation a Vapeur v. Bonnaisse, 2 Cir. 1927, 19 F.2d 777; *Eastern Massachusetts Street Ry. Co. v. Transmarine Corp.*, 1 Cir. 1930, 42 F.2d 58; *Berwind-White Coal Mining Co. v. City of New York*, 2 Cir. 1943, 135 F.2d 443.

Despite the plaintiff's false start in his original petition, it is now evident that the subject matter of the dispute is a bareboat charter. (1) During the term of the charter the charterer did have an option to purchase, but it was not exercised. (2) In the event of default in the monthly payments, the charterer had an option to purchase within thirty days of notice of default. But the charterer made it plain that he could not pay the monthly rentals, much less buy the vessels. (3) The charterer agreed "at the termination of the sixty-months period" to purchase each vessel for half of the agreed valuation (identical with the stipulated purchase price option). But the parties never reached the termination of the sixty-months period. The operable provisions of the contract therefore relate only to the bareboat charter. And the contract provided:

> No cancellation or other termination of this agreement by either party shall in any way relieve Charterer of liability for the payment of any sum or sums due or to become due Owner under this agreement, or any damages which Owner shall have sustained, whether by omission or commission.

Unlike *The Ada*, here the charterer made no offer to purchase the vessels; the charter was for a long term;

the total monthly payments were considerably less than the stipulated price; as indicated by the testimony of the charterer's president, the parties regarded the contract primarily as a bareboat charter, not as a contract to purchase. Well they should in view of the vessels' exposure for five years to the hazards of the sea.

We question the validity of a broad and mechanical formulation of *The Ada* rule that treats as non-maritime all charter parties to which is added an option or agreement to purchase. We prefer to follow the *Ciudad de la Habana*. In any event, on the facts before us the case under review is distinguishable from *The Ada*. We hold that the contracts here were primarily charter parties; that the provisions relating to the bareboat charter were maritime in nature and severable from the unexecuted options and the charterer's agreement to purchase on the termination of the charter.

We express no opinion as to how much of the total charter hire, if any, the plaintiff is entitled now to recover.

The district court's order denying the defendants' motion to dismiss the complaint is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX 2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27823

JACK NEILSON, INC.,
Petitioner-Appellant,
versus

TUG PEGGY, ET AL, TUG MARGARET, ET AL,
TUG CARMEN, ET AL,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(September 22, 1970)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 30, 1970, 5 Cir., 1970, ____ F.2d ____)

Before TUTTLE, WISDOM, and GOLDBERG, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the

Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

BAREBOAT CHARTER PARTY AND OFFER

This Charter Party made and concluded upon in the Town of Harvey, State of Louisiana, on the 11th day of April, 1965, between Jack Nelson, Inc., Owner of the [redacted] Fleet Official No. 270308, hereinafter referred to as "Owner", and Aquatic Towing Co., Inc., a Louisiana corporation, residing mail at P. O. Box 469, Harvey, Louisiana, hereinafter referred to as "Charterer",

WITNESSETH:

ARTICLE I.

Owner agrees to and does hereby charter bareboat with option to purchase said vessel during the charter term for ($0,000.00), with credit against above purchase price and "all-on" [redacted] between accruing at six (6%) per cent per annum for all charter hire previously paid hereunder, and Charterer agrees to and does hereby hire bareboat, under the terms and conditions set out in this Charter "as is" when delivered to Charterer, the [redacted], hereinafter referred to as "Vessel", for a period of fifty (50) months beginning with the delivery of the vessel to Charterer, afloat in the New Orleans area, Owner's option, and expiring sixty (60) months thereafter, unless prior to the expiration day the Vessel shall become a total loss, actual or constructive (no constructive total loss shall be defined in the policies of insurance hereinafter referred to), or unless this Charter is sooner cancelled as hereinafter provided. Time from the beginning day to the expiration day is sometimes herein referred to as the "charter period". It is hereby agreed that acceptance of Vessel and beginning of Charter period is April 11th 1965.

ARTICLE II.

a) Upon delivery of the Vessel by Owner to Charterer, the Vessel to the best of Owner's knowledge and belief then shall be tight, staunch, and seaworthy, but Owner mines no warranty or representation in this regard and none shall be inferred. Charterer's acceptance of Vessel shall be conclusive evidence that the Vessel is tight, staunch and seaworthy and fit and proper for the service for which Charterer will use it, and its acceptance by Charterer shall constitute a full performance by Owner as to all of Owner's obligations as to the furnishing of a Vessel which is tight, staunch and seaworthy and fit and proper for the service for which Charterer will use it. Thereafter, Charterer shall not be entitled to make or assert, against Owner any claim arising out of, or connected with, the condition of the Vessel, her engines, auxiliaries, tackle, apparel, furniture and equipment; and Charterer shall hold Owner harmless against any liability to any other party alleged to have arisen by reason of the condition of the Vessel, her engines, auxiliaries, tackle, apparel, furniture and equipment.

b) Owner and Charterer shall make an inventory (and appraisal of the spare or replacement parts, tackle, apparel, furniture, equipment, fuel, lubricating oil and stores on the Vessel upon delivery, and Charterer shall pay Owner therefor upon acceptance of the Vessel.

ARTICLE III.

a) Beginning with the delivery of the Vessel to Charterer, during the charter period and until return of the Vessel by Charterer to Owner afloat in the New Orleans area, Owner's option (unless a different redelivery point shall be mutually agreed upon by the Owner and Charterer), Charterer shall maintain the vessel in the same order and condition, ordinary wear and tear excepted, as when received by Charterer. Charterer shall pay to Owner charter hire at the rate of $ [illegible] per month in advance, the first payment of charter hire [illegible] for period [illegible] April 17th noon, 1965 through May 16th noon 1965, and thereafter charter hire shall be paid monthly in advance on the same day of each calendar month. All payments of charter hire shall be made at the office of Owner at P. O. Box 231, Harvey, Louisiana, unless and until Owner shall elect to receive charter hire elsewhere and shall so notify Charterer in writing.

b) In the event of a total loss of the Vessel, actual or constructive (as constructive total loss shall be defined in the policies of insurance hereinafter referred to), charter hire shall cease as of the date of such total loss; otherwise charter hire shall not cease or be suspended for any reason during the charter period and shall be paid by Charterer until redelivery of the Vessel by Charterer to Owner (subject to the agreement of Charterer to continue this charter party or to purchase the Vessel as herein provided).

ARTICLE IV.

a) Upon tender of the Vessel for redelivery from Charterer to Owner, it shall be drydocked at New Orleans, unless some other place be mutually agreed upon between Owner and Charterer, and a joint survey made by Owner and Charterer to determine the condition of said Vessel and written report of such survey shall be made. The cost of such drydocking and surveying shall be borne by Charterer and Owner jointly in the proportion of one-half each. The survey shall be conducted by a surveyor chosen jointly by Owner and Charterer, and if they do not agree on a single surveyor, then the Owner and Charterer shall each select one representative, and if they do not agree, the two surveyors shall choose an umpire and the determination of any two of the three shall be final and conclusive upon both Owner and Charterer. Should the two surveyors fail to agree upon the third surveyor, he shall be appointed by a judge of the United States District Court for the Eastern District of Louisiana.

b) If upon tender of the Vessel for redelivery by Charterer to Owner and after survey any dispute should arise between Owner and Charterer with respect to the order or condition of the Vessel, or with respect to liability for painting, repairs, renewals, reconditioning, cleaning, replacement, or any other expense, either Owner or Charterer, without prejudice to its contention, may repair or recondition the Vessel or make and pay for such painting, repairs, renewals, reconditioning, cleaning, replacement or any other expense, or any part thereof, and may recover the cost thereof from the party for whose account it may properly be under the terms of this charter party; and if liability therefor be determined to be that of Charterer, Charterer shall pay charter hire and the premium on the insurance policies hereinafter provided for during the period necessary to effect the reconditioning of the Vessel or the painting, repairs, renewals, cleaning, replacement or any other expense, or any part thereof, for which Charterer may be liable.

ARTICLE V.

a) Subject to agreement of the underwriters of the marine insurance provided for in Article VIII, hereinafter, Charterer may use, operate and navigate the Vessel for all lawful purposes in the inland navigable waters of the United States, and offshore in the Gulf of Mexico. In no event shall the Charterer use, operate or navigate the Vessel in waters where there is an insufficient depth of water for the Vessel to lie safely afloat at all times and under all conditions, or outside of the navigation limits then prescribed in any policy of insurance on the Vessel.

b) Charterer shall at all times operate the Vessel carefully and efficiently and shall at no time misuse or abuse it. In the operation and maintenance of the Vessel, Charterer shall satisfy and comply with all insurance requirements, the requirements of the United States Coast Guard and of any and all other Government agencies having jurisdiction of the Vessel and of any barges or other craft and their cargoes towed by the Vessel, and passengers aboard the Vessel. Charterer shall not make any structural additions or alterations to the Vessel at any time without the prior written consent of Owner.

c) Charterer at all times, at its sole cost and expense, shall maintain and keep the Vessel, its engine, auxiliaries, tackle, apparel, furnishings and equipment seaworthy, painted, clean and in good running order and condition. Owner shall have the right to inspect the Vessel at all reasonable times during the charter period and when so requested Charterer shall advise Owner of the whereabouts of the Vessel and facilitate Owner's inspection thereof.

d) Charterer shall, at its own cost and expense, or by its own procurement, man, victual, use, operate, navigate, supply, maintain, repair and fuel the Vessel and shall pay all costs, claims, charges and expenses of every kind and nature whatsoever, with respect to or incident with, or relating to the foregoing and, in connection therewith, shall strictly comply with and be bound by the provisions of Article VI hereof. Charterer shall keep the Vessel properly manned, equipped and supplied at all times during the charter period. Charterer shall furnish at its own cost and expense all rigging, cable, rope, bridles, chains, shackles, catchets, towing and mooring equipment, and all other equipment, including galley, deck and engine equipment. Owner makes no warranty or representation that any of the foregoing described items will be on board the Vessel at the time of delivery to Charterer. Charterer shall use reasonable care in the selection of masters and crew employed by Charterer in the use, operation and navigation of the Vessel and shall require said masters and crew to be duly licensed in accordance with law, if, whenever and wherever licensed personnel may be required by law.

e) Charterer shall pay or cause to be paid to the proper authority, when and as they become due all of pilotage and other taxes, licenses fees, assessments, and similar charges which at any time during the term of this charter may be taxed, assessed or imposed upon the Vessel, Owner or Charterer with respect to, or upon the use, operation or navigation of the Vessel (excluding the Owner's income from the Vessel); provided, however, that nothing herein contained shall be construed to prevent the Charterer from validly and in good faith contesting the applicability or validity of any such tax, assessment or similar charge, but such contest shall be subject to the provisions of Article VI(a) of this charter party.

f) Charterer shall, in the use, operation and navigation of the Vessel, comply with all applicable Federal, State, Municipal and Local laws and with the rules, orders, regulations, directives and requirements of any departments, commissions and bureaus, and with all local ordinances and regulations, and shall indemnify and hold Owner and the Vessel harmless from all libels, maritime and other liens, claims, charges, encumbrances, suits and penalties which may be imposed upon, or filed against, Owner or upon the Vessel, by Federal, State, Municipal or Local authority or by any departments, commissions or bureaus thereof by reason of any asserted violation by Charterer or the Vessel, of such laws, rules, orders, ordinances, regulations, directives, or requirements.

ARTICLE VI.

a) Neither Charterer nor any of its officers, employees or agents, nor the Master or any other officer or member of the crew of the Vessel shall have any right, power or authority to create, incur, suffer or permit to be placed or imposed upon the Vessel any maritime or other lien, encumbrance or charge whatsoever or to incur debt, obligation or charge upon the credit of the Vessel. In the event, notwithstanding the foregoing, a maritime or other lien, encumbrance or debt shall be placed upon the Vessel, or in the event the Vessel shall be levied against or taken into custody by virtue of any legal proceedings in any court, based upon a claim or cause of action, valid or invalid, founded or unfounded, alleged to have arisen during the term of this charter party, Charterer shall, within fifteen (15) days cause the Vessel to be released and the asserted libel, maritime or other lien, encumbrance or charge to be discharged or secured.

b) Charterer shall carry and keep a copy of this charter with the Vessel's papers and in the Charterer's office and shall exhibit or cause to be exhibited a copy of this charter party to all persons, firms and corporations having business with the Vessel which might give rise to any maritime or other lien or claims, encumbrances or charge whatsoever. Charterer shall notify all persons, firms and corporations furnishing repairs, stores, supplies, fuel or other necessaries to the Vessel that neither Charterer nor any of its officers, employees or agents nor the master or any other officer or member of the crew of the Vessel has any right, power or authority to create, incur or suffer or permit to be placed or imposed upon the Vessel or maritime or other lien, encumbrance, claim or charge whatsoever or to incur any debt, obligation or charge upon the credit of the Vessel, and such notice so far as practicable, shall be in writing. Charterer shall promptly notify Owner of the institution of any proceedings against the Vessel.

c) Charterer shall, at all times during the charter period, prominently display on the Vessel notices to the effect that the Vessel is the property of Jack Neilsen, Inc., and that no person, firm or corporation has any authority to create, incur or suffer or permit to be placed or imposed upon the Vessel any lien, debt, charge or encumbrance whatsoever.

d) Upon redelivery of the Vessel by Charterer to Owner, it shall be free and clear of all maritime or other liens, encumbrances, claims and charges of whatsoever nature and kind. If after redelivery of the Vessel by Charterer to Owner, there be asserted against the Vessel or Owner any claim or maritime or other lien, encumbrance, claim or charge of any nature and kind whatsoever, alleged to have arisen during the charter period,

whether valid or invalid, founded or unfounded, Charterer, at its sole cost and expense, shall cause such maritime or other lien, encumbrance, claims and charges of whatsoever nature and kind to be discharged or secured forthwith, and shall indemnify and hold the Vessel and Owner harmless against all liability therefor.

ARTICLE VII.

Charterer hereby agrees to and does hereby waive all claims for loss, damage to, or expense incurred in connection with the towage of barges and other craft by said Vessel in tow of the Vessel, which barges and other craft in tow of the Vessel are owned or chartered by Charterer or by Charterer's subsidiary or affiliated or inter-related companies. Charterer shall indemnify and hold the Vessel and Owner harmless against all liability and claims for losses and damage sustained, or alleged to have been sustained, by any vessel and any cargo thereon, however owned, while in tow of the Vessel or for which Owner or the Vessel are alleged to be liable.

ARTICLE VIII.

a) The obligation of Charterer at the termination of this charter party, however terminated, to return to Owner the Vessel in the same order and condition as when received by Charterer, ordinary wear and tear excepted, shall be absolute and Charterer shall not be excused therefrom in whole or in part by reason of any happening or occurrence whatsoever, including, without limitation, Acts of God, force majeure, and willful or negligent acts of third parties for which said third-parties may be liable. While in the possession of Charterer, the Vessel shall be at Charterer's risk of loss and damage however caused. For the purpose of this charter party and as between the Owner and Charterer, the value of the Vessel is fixed at the sum of $60,000.00. In the event of loss or inability of Charterer to return the Vessel to Owner for any reason, Charterer shall pay Owner the said sum of $60,000.00 less net charter hire paid before the loss, subject to a credit of any amount actually collected by Owner from the insurances hereinafter recited, and Charterer shall remain liable to Owner for any uncollected balance. In the event that any underwriter shall deny liability, Charterer shall make due and proper payment to Owner, upon Owner subrogating Charterer to all rights and causes of action against the underwriter.

b) Charterer shall procure, maintain and provide, at its own cost and expense during the charter period and until Owner will have accepted redelivery of the Vessel (including time necessary to effect the repair or reconditioning of the Vessel and any painting, repairs, removals, reconditioning, cleaning and replacement for which Charterer may be liable under the terms of this charter party), marine insurance on the Vessel written on "Vessel Syndicate Form 1946 revised March 1, 1946 (53-H)" or on a substantially equivalent form approved by Owner (including collision, tower's liability and Inchmaree coverage satisfactory to Owner) in the sum of $ 60,000.00 with a deductible average not exceeding the sum of $ 1,500.00. Charterer shall also procure, maintain and provide at its sole cost and expense during the charter period and until Owner will have accepted redelivery of the Vessel (including any time necessary to effect the repair or

reconditioning of the Vessel and any painting, repairs, renewals, reconditioning, cleaning and replacement for which Charterer may be liable under the terms of this charter party) P & I insurance in the sum of $ 60,000.00 with a deductible average not exceeding $ 500.00 [illegible] of a form satisfactory and acceptable to Owner. Both the marine and P & I insurance shall be written with companies satisfactory to Owner and shall name Owner and Charterer as assureds thereunder, with losses payable to them as their respective interests may appear. Owner shall be furnished with either originals or certified copies of the insurance policies in forms satisfactory to Owner. Such insurance policies shall provide that Owner shall be given fifteen (15) days advance notice of cancellation.

c) The proceeds of all insurance referred to above shall be available as follows: (1) In the event of total loss of the Vessel, either actual or constructive (as constructive total loss is defined in the applicable insurance policies), the proceeds of the insurance shall be paid to Owner and Charterer as their interests may appear; (2) In the event of damage to the Vessel less than a total loss, either actual or constructive, if the cost of repair, restoration or replacement will be actually paid by Charterer, the proceeds of the applicable policies of insurance shall be paid to Charterer; otherwise, the proceeds shall be paid to Owner. Any property restored or replaced shall be the property of Owner and so identified and shall be subject to all the terms and provisions of this charter party; (3) In the event of any third-party claims, whether for personal injury, death claim or for property damage, which shall constitute claims under any of said insurance, the proceeds of the insurance shall be made available to Charterer to reimburse Charterer, to the extent of the insurance collected, for any of its funds used to settle or pay any such claim or any judgment resulting therefrom, if paid or discharged by Charterer and provided such payment or discharge by Charterer shall be to the full acquittance and discharge of Owner and the Vessel; otherwise such insurance proceeds shall be paid to Owner.

d) Charterer shall pay all deductible averages in any insurance and in the event of any damage or injury to, or loss of the Vessel or any third-party claim for any cause not covered by said insurance, Charterer shall make good said damage, injury, loss or third-party claim at its own cost and expense and shall indemnify and hold harmless the Vessel and Owner against all suits, claims and demands in respect to said damage, injury, loss or claim. Charterer shall pay for any loss or damage covered by said insurance for which no reimbursement is paid for any reason or incomplete reimbursement is made by reason of the deductible provisions of said insurance or any other reason.

ARTICLE IX.

Charterer shall indemnify, hold harmless and defend the Owner and the Vessel from all libels, maritime liens and other liens, suits, encumbrances, charges, claims, liabilities, costs and expenses of whatsoever nature and kind, arising out of the use, operation, navigation, manning, victualing, supplying, repairing, maintaining and fueling of the Vessel or out of any act in violation of this charter or out of any fault or neglect of Charterer, its officers, agents, servants or employees.

ARTICLE X.

Charterer shall not, without prior written consent of Owner, sell, assign or pledge this Charter or any of its rights or obligations hereunder and shall not, without the prior written consent of Owner, subcharter, let or hire or permit the use by others of the Vessel.

ARTICLE XI.

The failure of Owner to insist in any one or more instances upon performance of any of the terms, covenants and conditions of this charter party shall not be construed as a waiver or relinquishment of the future performance of any such term, covenant or condition, but Charterer's obligation with respect to such future performance shall continue in full force and effect.

ARTICLE XII.

Owner shall at all times have the right to invoke any remedy permitted by law, in equity or in admiralty for the protection of its interest hereunder. Charterer hereby expressly waives all rights which it may have to be given notices by Owner other than as provided herein.

ARTICLE XIII.

If Charterer fails to pay any charter hire or other amount herein provided after the same is due and payable, or if Charterer fails to observe, keep or perform any other provisions of this charter party required to be observed, kept or performed by Charterer, then upon written notice of said default Charterer is to have (30) thirty days from receipt of said notice to purchase said Vessel for $60,000.00 plus six (6%) per cent interest per annum accrued thereon up to the time of the purchase. The full charter hire previously paid as of the date of the written notice shall be applied toward the purchase price and accumulated interest.

ARTICLE XIV.

At the termination of the sixty (60) month period, Charterer agrees to purchase the Vessel and Owner agrees to sell said Vessel to Charterer for $30,000.00 cash.

No cancellation or other termination of this agreement by either party shall in any way relieve Charter of liability for the payment of any sum or sums due or to become due Owner under this agreement, or any damages which Owner shall have sustained, whether by omission or commission.

ARTICLE XV.

The address of Charterer for the sending of notices under this agreement is P. O. Box 409, Harvey, La., and the address of Owner for the sending of notices under this agreement is P. O. Box 201, Harvey, La. Any notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper, addressed as aforesaid, registered and deposited, postage and registry fees prepaid, in a post office regularly maintained by the Government of the United States of America.

ARTICLE XVI.

Owner may assign this charter party or any interest therein, and in such event Owner shall remain obligated to see that the conditions, terms and obligations imposed upon it by this charter party are fulfilled and performed in each and every detail.

ARTICLE XVII.

This agreement has been executed simultaneously in several counterparts, and each of such counterparts is deemed to be an original and, all together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Charter Party and Option has been executed as of the day and year first above written by

WITNESSED:

Agnes Bayless

W. H. Wellman

Agnes Bayless

W. H. Wellman

Agnes Bayless

W. H. Wellman

Agnes Bayless

W. H. Wellman

JACK NELSON, INC.

By: Jack Nelson
JACK NELSON, PRESIDENT

APACHE TOWING, INC.

By: Henry A. Billiot
HENRY BILLIOT, PRESIDENT

CIMARON TOWING, INC.

By: Henry A. Billiot
HENRY BILLIOT, PRESIDENT

MARCO TOWING CO.

By: Henry A. Billiot
HENRY BILLIOT, PRESIDENT

PERSONAL ENDORSEMENTS:

Henry A Billiot

Edward Hunsucker

APPENDIX 4

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

JACK NEILSON, INC.	
versus	IN ADMIRALTY
TUG "PEGGY", her engines, tackle, apparel, furniture, and appurtenances, Apache Towing Co., Inc., Marco Towing Co., Inc., Cimmeron Towing Co., Inc., Henry A. Billiot, Edward L. Buras and James J. Buras	NO. C 35 DIVISION "C"

L I B E L

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION:

The libel and complaint of Jack Neilson, Inc., former owner of the TUG "PEGGY", her engines, tackle, apparel, furniture, appurtenances, etc.; against Apache Towing Co., Inc., Cimmeron Towing Co., Marco Towing Co., Henry A. Billiot, Edward L. Buras, Sr., and James J. Buras, and against all persons intervening for their interest herein, in a cause of possession and breach of contract, civil and maritime, with respect represents that:

I

Libellant, Jack Neilson, Inc., at all times hereinafter mentioned, was and presently is, a corporation organized and existing by virtue of the laws of the State of Louisiana, with its principal place of business within the town of Harvey, Louisiana.

II

Libellant, at all times hereinafter mentioned, was the sole owner of the motor vessel, TUG "PEGGY", official No. 276368, whose approximate dimensions are 58.0 feet in length, 17.9 feet in breadth, and 7.1 feet in depth. The TUG "PEGGY" is now, or will be during pendency of process herein, afloat on the navigable waters of the United States within this District, and, within the jurisdiction of this Honorable Court.

III

Respondent, Apache Towing, Inc., at all times hereinafter mentioned was and presently is, a corporation organized and existing by virtue of the laws of the State of Louisiana, with its principal place of business at Harvey, Louisiana.

IV

Respondent, Cimmeron Towing, Inc., at all times hereinafter mentioned, was and presently is, a corporation organized and existing by virtue of the laws of the State of Louisiana, with its principal place of business at Harvey, Louisiana.

V

Respondents, Henry A. Billiot, d/b/a Marco Towing Co., Edward L. Buras, Sr., and James J. Buras are persons of the full age of majority, and are residents of the Parish of Jefferson, State of Louisiana.

VI

On or about April 13, 1965, libellant entered into a purchase agreement with respondent, Apache Towing Co., Inc. for the [illegible] "PEGGY" for the full amount of $60,000.00. Cimmaron Towing,

Inc., Marco Towing Co., Henry A. Billiot, Edward L. Buras, Sr., and James J. Buras, executed the agreement as guarantors. Pursuant to the terms and conditions of said agreement, the TUG "PEGGY" was duly delivered to Respondent, Apache Towing Co., Inc. at the Port of New Orleans on or about April 17, 1965, for the consideration of monthly payments at the rate of Eight Hundred ($800.00) Dollars payable in advance on or before the 17th day of each successive month. Copy of said agreement is attached hereto marked Exhibit "A" and is made part hereof.

VII

Respondent, Apache Towing Co., Inc. has failed to make monthly payments as provided by the terms and conditions of aforesaid agreement, Respondent, Apache Towing Co., Inc. having voluntarily returned said vessel to Libellant.

VIII

In accordance with the terms and conditions of said agreement dated April 17, 1965, Libellant hereby demands payment in full of the purchase price of $60,000 subject to a reduction by the amount previously paid by Respondent, Apache Towing Co., Inc., of $4,000.00.

IX

Libellant further avers that the TUG "PEGGY" was returned to Libellant in a damaged and deteriorated condition. The cost of repairs to restore said vessel to her same good order and condition

as when received by Respondent is estimated to be $7,500.00. Libellant avers amicable demand to no avail.

X

All and singular the premises are true and correct and within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, Libellant prays that process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said TUG "PEGGY", her engines, tackle, apparel, furniture, appurtenances, etc.; that the said Apache Towing Co., Inc., as purchaser and Cimmaron Towing Co., Marco Towing Co., Henry A. Billiot, Edward L. Buras, Sr., and James J. Buras, as guarantors, be cited to appear and answer all and singular the matters aforesaid, that this Court order and decree that Apache Towing Co., Inc., as purchaser, and Cimmaron Towing Co., Marco Towing Co., Henry A. Billiot, Edward L. Buras, Sr. and James J. Buras, as guarantors, be cited to appear and answer all and singular the matters aforesaid; that Apache Towing Co., Inc., as Purchaser and Cimmaron Towing Co., Marco Towing Co., Henry A. Billiot, Edward L. Buras, Sr. and James J. Buras, as guarantors, be condemned to pay Libellant $56,000, and costs in the premises; and that libellant have such other and further relief in the premises as law and justice may be entitled to receive.

MORGAN, VON HOENE and BECKER

By:_____

WILLIAM L. VON HOENE
1216 Int'l. Trade Mart Tower
Number 2 Canal Street
New Orleans, Louisiana 70130
524-9602
Attorneys for Libellant

[redacted]
[redacted]
JUNE 10, 1968

APPENDIX 5

[redacted], INC. — NO. 6330
VERSUS — IN ADMIRALTY
THE VESSEL, ETC., IN REM — PROCTOR'S

[redacted] — NO. 6369
VERSUS — IN ADMIRALTY
THE [redacted], ETC., IN REM — PROCTOR'S

[redacted], INC. — NO. 6370
VERSUS — IN ADMIRALTY
THE [redacted], ETC., IN REM — PROCTOR'S

This cause came on for hearing on another day.

Present:

George O'Neil, Esq.,
Attorney for Edward L. and James J. Burns

William L. Van Keuren, Esq.
Attorney for Libelant

IT IS ORDERED that the motion of defendants, Edward [redacted] and James J. Burns excepting to the jurisdiction of this court is granted.

(Sgd) L L M.

30 day appeal time

EPP-3536

3339 New Orleans

JUL 19 1968

MINUTE ENTRY:
OCTOBER 23, 1968
MITCHELL, J.

APPENDIX 6

CONSOLIDATED CASES

JACK NEILSON, INC.	SECTION "B"
versus	NO. 8235 ✓
TUG "PEGGY", et al	ADMIRALTY
JACK NEILSON, INC.	
versus	NO. 8269
TUG "MARGARET", et al	ADMIRALTY
JACK NEILSON, INC.	
versus	NO. 8270
TUG "CARMEN", et al	ADMIRALTY

This cause came on this day for hearing on motion of Edward J. Burns and James J. Burns, defendants, to be dismissed as defendants.

PRESENT: William L. Van Hoose, Esq.
Attorney for Plaintiff

George O'Daud, Esq.
Attorney for Edward & James Burns

Argument.

IT IS ORDERED that the Court's previous ruling dismissing Edward J. Burns and James J. Burns be, and the same is hereby, held in abeyance and plaintiff is given ten days in which to file a supplemental and amended complaint.

Thomas H. Leech, Esq.

Donald Collins, Esq.

J. P. Delaney, Esq.

91
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11-6-68(5)
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CHARGE
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DENIAL
HEARING
DOCUMENT NO.

MINUTE ENTRY
MITCHELL, J.
FEBRUARY 24, 1969

APPENDIX 7

JACK PHILCO?, INC. NO. 8235

VERSUS IN ADMIRALTY

TUG PEGGY, ETC., ET ALS SECTION F

This cause came on for hearing on another day.

Present:

William Von Hoene, Esq.
Attorney for plaintiff

George O'Dowd, Esq.
Attorney for defendants Edward and James Duras

IT IS ORDERED that the motion of the defendants Edward Duras and James J. Duras excepting to the jurisdiction of this Court be denied. The provisions of the contract are severable and plaintiff may sue in admiralty under the charter provisions of the contract.

FEES
PROCESS
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FILED
DEC 16 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1123

JACKSON FARMERS, INC. (Formerly Farmers Union Co-Operative Business Association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

PHILIP H. LEWIS
WILLIAM G. HAYNES
1300 Merchants National Bank Building
Topeka, Kansas 66612
Counsel for Petitioner

R. L. Hildebrand, Inc., 920 Cherry Street, Kansas City, Mo. 64106, 421-5920

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BOARD RULES

29 C.F.R. 102.67(c) 6
29 C.F.R. 102.67(d) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

JACKSON FARMERS, INC. (Formerly Farmers Union Co-Operative Business Association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

Jackson Farmers, Inc. (formerly Farmers Union Co-operative Business Association) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Circuit Court is reported at ..... F.2d ..... A copy of this opinion is appended hereto.

JURISDICTION

The judgment was entered on September 30, 1970. A petition for rehearing was denied on October 28, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.) (hereinafter called the "Act"), and of the Administrative Procedure Act, 5 U.S.C.A. 557(c), are set forth in Appendix E infra.

QUESTION PRESENTED

Did the National Labor Relations Board err in finding Jackson Farmers, Inc. (hereinafter referred to as "petitioner" or "employer") violated Section 8(a)(5) of the Act when it refused to bargain with a newly certified union after the Board denied the employer's request for review of the Regional Director's unit determination on the grounds that it did not raise substantial issues warranting review, and that thereafter the Board failed to make its own determination or give plenary review to the Regional Director's determination when issuing an unfair labor practice order based on such determination, although Section 10(c) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

STATEMENT OF THE CASE

Upon two separate petitions for certification of collective bargaining representative being filed pursuant to Section 9(c) of the Act by the American Federation of Grain Millers, AFL-CIO (hereinafter called the "Union"),

a hearing was held on November 1, 1960 before a hearing officer designated by the Regional Director for the Seventeenth Region of the National Labor Relations Board (hereinafter called the "Board"). The issue in the hearing was whether or not the service station employees should be included in the same unit as the elevator and feed mill employees, and whether or not there was a sufficient number of the work complement available to participate in the elections since this was the off season in the employer's operation and less than fifty per cent (50%) of the complete work complement was employed at that time. On November 25, 1960 the Regional Director for Region Seventeen issued: (1) a decision and direction of election in an appropriate unit of the respondent's employees consisting of office clerical employees; and (2) a decision and direction of election in an appropriate unit of respondent's employees consisting of production and maintenance employees. Pursuant to the Regional Director's decision and direction of election and after the employer's petition for review had been denied by the Board, elections by secret ballot were conducted in the two appropriate units. Both units designated the Union as their collective bargaining representative. The Union was certified by the Regional Director as bargaining agent in the two units. The employer thereafter filed on the 25th day of February, 1960 a timely request for review of the Seventeenth Regional Director's Supplemental Decision and Certification of Representative which established the two bargaining units as aforesaid and excluded one clerical employee as ineligible because she, as wife of the manager, received "special treatment." The employer contended that the Regional Director's exclusion of this clerical employee and voiding her ballot was not based upon reasonable grounds and was therefore arbitrary and capricious. On or about March 7, 1960 the Board, by

telegraphic order, denied the Company's request for review of the Regional Director's Supplemental Decision and Certification as it "raised no substantial issues warranting review."

On March 18 the Union filed charges alleging that the employer had refused to bargain with it in violation of Section 8(a)(5) of the Act. The employer admitted its refusal to bargain and stated that its sole objective in so doing was to test the validity of the certification. The employer asserted: (1) that its operation is seasonal, and that the election was conducted at a time of the year when only fifty per cent (50%) of the peak season work complement was employed; (2) the service station employees which were included with elevator and feed mill employees had little or no community of interest; and (3) a clerical employee, whose vote could have determined the results of the election, was disenfranchised by the Regional Director because she received special treatment as wife of the manager.

Counsel for the General Counsel filed a motion for summary judgment on May 2, 1969 and the Trial Examiner's decision issued without a hearing on or about July 9, 1969. On August 13, 1969 the Company filed timely exceptions to the Trial Examiner's decision with a supporting brief. On September 5, 1969 the Board issued its decision and order affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. Neither the Trial Examiner's decision nor the Board's decision and order included an independent determination concerning the appropriate bargaining unit. Upon the Board's petition for enforcement, the United States Court of Appeals for the Tenth Circuit, under the authority of Section 212 of Title 28, United States Code, enforced the Board's order. In so doing, the Court spe-

cifically disagreed with the respondent's contention that the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company* v. *N.L.R.B.*, 409 F.2d 676 (C.A. 2, 1969), and *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d 78 (CA 4, 1969), were controlling, and based its decision upon *N.L.R.B.* v. *Magnesium Casting Company*, 427 F.2d 114 (C.A. 1, 1970), petition for writ of certiorari granted on October 12, 1970.

REASONS FOR GRANTING THE WRIT

Under Section 10(c) of the National Labor Relations Act, the Board is required to review a regional director's findings of fact and decision in a representation proceeding and to make its own determination in an unfair labor practice proceeding before deciding whether or not an unfair labor practice has been committed. The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(c) of the Act by permitting a regional director's finding of fact and decision to be the basis of an unfair labor practice finding without any Board review and the decision or independent determination of the issues represented in a representation proceeding.

Section 10(c) of the Act specifically provides that the Board itself must determine if a party has committed an unfair labor practice. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 447 (1951). Merely because the issue in a representation proceeding was ruled upon by the Regional Director does not relieve the Board of its statutory responsibility. Clearly, if there had been no representation proceeding and the charges arose strictly out of an unfair labor practice charge, a full hearing of the issue is mandatory with a trial examiner hearing the evidence and making his own findings of fact and conclusions of

law based on the evidence introduced before him with the Board, pursuant to Section 10(c), affording full review of such findings and conclusions.

The issue before the Court is whether Section 3(b) of the Act, which provides a regional director with authority to rule in representation proceedings only, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Second and Fourth Circuit Courts of Appeals in *Pepsi-Cola*, supra, and in *Clement-Blythe*, supra, respectively, have answered the question in the negative, while the First Circuit in the *Magnesium* case, supra, has answered in the affirmative. The question of whether or not the party is entitled to a full Board review in an unfair labor practice proceeding of a regional director's representation decision is of crucial importance to all parties to the Board proceedings and the existing conflict results in conflicting Board practices determined according to the circuit in which the case is pending. Furthermore, the conflict encourages circuit hunting in an effort to obtain jurisdiction in that circuit court which is most receptive to the particular party's posture in this matter.

Under Section 3(b) of the Act, the Board may delegate to its regional directors its powers, "Under Section 9 to determine the unit appropriate for the purposes of collective bargaining." Discretionary review is permitted by the Board under 29 C.F.R. 102.67(c) for one or more of the following reasons:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from official reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous upon a

record and such error prejudicially affects the rights of a party.

(3) That the conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board policy or rule.

The employer herein filed a request for review based on the above, and it was denied by the Board because it "raised no substantial issues warranting review." Thus leaving the Regional Director's decision as the only determination on the issue. There is no evidence that the Trial Examiner and/or the Board reviewed the record, although 29 C.F.R. 102.67(d) states the "request for a review" must be a document "enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." Thus, the aforesaid Board rules do not require a full and independent review of the record in making a representation determination. But 10(c) of the Act requires the Board to make a full and independent review in an unfair labor practice determination. It is this failure of the Board to perform its functions pursuant to Section 10(c) of the Act which the employer respectfully submits is in violation of 5 U.S.C. Section 557 (c).

In *Pepsi-Cola*, supra, Judge Kaufman, in holding that the Board itself must decide whether an unfair labor practice has been committed, stated:

> "In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a Regional Director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. (*5) Moreover, the Board's experience is particularly relevant and desirable in

deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are involved. (*6) See NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 41 (1957); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

"(*5) '(A)nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads.' Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. Porter v. Roach, 69 F. Supp. 56 (D. Ore. 1946).

"(*6) But the Supreme Court has indicated that a court's deference to the Board is not limited to issues involving the Board's expertise but extends to situations such as this, where the decision rests on the common law of agency, a law which a court might apply as effectively as the Board. NLRB v. United Insurance Co., 390 U.S. at 260."

The expertise of the Board members is the basis for their selection as agency heads. While Section 3(b) of the Act provides for the Regional Director's authority to rule in Section 9 proceedings, which are limited to representation proceedings, nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings which bear the possibility of findings of unfair practices and court enforceable remedial orders. Where an integral part of those unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional directors more discretion in representation proceedings, it also maintained the added insurance

that the regional directors' decisions would be permitted review by the Board. See 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1811-12 (1959). By failing itself to determine the issues raised before it in the present case, the Board has acted contrary to the explicit intent and direction of Congress in Section 10(c) of the Act and has deprived the employer of its specific rights as a litigant under the Act. *Pepsi-Cola Buffalo Bottling Co.* v. *N.L.R.B.*, supra.

Although the Board argued in its brief to the First Circuit Court that the representation and unfair labor practice proceedings are "really one and a single trial of the representation issue is enough," relying on *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of its own on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its power under Section 9 to a regional director in a representation matter only. The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. The Board is required to rule at least once on the unit issue!

The First Circuit Court states that Congress intended to expedite all case handling in representation and unfair labor practice proceedings by the Section 3(b) amendment. If so, why did Congress limit the regional director's authority to the Board's Section 9 representation powers? If the only issue in a refusal to bargain complaint was the unit issue, then the Court would be left with the duty to review only the Regional Director's determination, and not that of the Board, as so empowered in Sections 10(e) and 10(f) of the Act.

Furthermore, the procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .

Nowhere in the record before this Court did the Board state its reasons or basis for making its findings or reaching its conclusions. The Board's only action was to say that the employer's request for review in the representation proceedings raised "no substantial issues warranting review."

That this method of handling an unfair labor practice proceeding is proscribed was also stated by Circuit Judge Butzner in *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d 78 (C.A. 4, 1969), at 81:

> "When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty of stating the reasons why the Board concluded the

facts showed a violation of the law, cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 195 (1941); 2 David, Administrative Law Sec. 16.12 (1958). No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings. The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. Sec. 160(c).".

In view of the conflict of the First Circuit Court with the Second and Fourth Circuit Courts on the important issues of the scope of a regional director's authority in determining unfair labor practice charges and the degree to which the Board may or may not delegate its authority to decide unfair labor practices to the regional director, this Court must insure the orderly and proper administration of the Act by resolving these issues.

CONCLUSION

For the reasons set forth above, and because This Honorable Court has granted a petition for certiorari in *Magnesium Casting*, on which the Tenth Circuit relied in making its determination herein presented, it is urged this petition for certiorari be granted and this case be remanded to the Tenth Circuit so that it can determine the matter in agreement with the decision to be handed down by this Court in *Magnesium Casting*.

Respectfully submitted,

PHILIP H. LEWIS
WILLIAM G. HAYNES
1300 Merchants National Bank Building
Topeka, Kansas 66612
Counsel for Petitioner

December 15, 1970.

APPENDIX A

TXD-388-69
Holton, Kansas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases Nos. 17-CA-3836-1
17-CA-3836-2

FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO

Frederick C. Herzog, Esq., for the General Counsel.
William G. Haynes, Esq., (*Lillard, Eidson, Lewis & Porter*), Topeka, Kan., for the Respondent.

Trial Examiner's Decision

Statement of the Case

The Representation Proceedings[1]

Upon petitions filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) on October 1,

1. Administrative or official notice is taken of the record in the representation proceedings, Cases Nos. 17-RC-5851 and 17-RC-5874, as the term "record," is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as amended). See *LTV Electrosystems, Inc.*, 166 NLRB No. 81, enf'd 388 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB No. 24; *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Intertype Co. v. N.L.R.B.*, 401 F. 2d 41 (C.A. 4, 1968); *Follett Corp., et al.*, 164 NLRB No. 47, enf'd 397 F. 2d 91 (C.A. 7, 1968); Section 9(d) of the National Labor Relations Act.

1968 in Case No. 17-RC-5851 and on October 25, 1968 in Case No. 17-RC-5874, by the American Federation of Grain Millers, AFL-CIO, herein called the Union, a hearing was held on the question of representation presented in the two cases, pursuant to a Notice of Representation Hearing and Order Consolidating Cases, on November 4, 1968, before a Hearing Officer of the National Labor Relations Board. Thereafter on November 26, 1968, the Regional Director for Region 17 pursuant to Section 102.72(a)(4) and (c) of the Board's Rules, severed Case No. 17-RC-5851 from Case No. 17-RC-5874 and issued, on the same day, (1) a Decision and Direction of Election in Case No. 17-RC-5851 in an appropriate unit of Respondent's employees described hereinafter and (2) a Decision and Direction of Election in Case No. 17-RC-5874 in an appropriate unit of Respondent's employees described hereinafter.

On December 9, 1968, Respondent filed with the Board in Washington, D.C., a petition for review of the Regional Director's Decision and Direction of Election in Case No. 17-RC-5851. On December 23, 1968, the Board denied Respondent's petition for review. No request for review of the Decision and Direction of Election was filed in Case No. 17-RC-5874.

Pursuant to the respective directions of election, elections by secret ballot were conducted on December 31, 1968, among the employees in the appropriate units to determine the question concerning representation. Upon conclusion of the balloting, tallies of the ballots in both elections were prepared. In Case No. 17-RC-5851, of a total of approximately 17 eligible voters, 13 cast ballots for the Union, 3 cast ballots against the Union, no ballots were challenged and no ballots were void. In Case No. 17-RC-5874, of a total of approximately 4 eligible voters, 2 cast ballots for the Union, one ballot was cast against

the Union, one ballot was challenged, and no ballots were void. The challenged ballot in Case No. 17-RC-5874 was sufficient to affect the results of the election.

No objections to conduct affecting the results of election were filed in Case No. 17-RC-5851, and, accordingly, on January 15, 1969, the Regional Director issued and duly served on the Respondent and the Union a Certification of Representative, certifying the Union as the representative for the purposes of collective bargaining for the employees in the appropriate unit. No objections to conduct affecting the results of the election were filed in Case No. 17-RC-5874. The challenged ballot was then investigated pursuant to Section 102.69 of the Board's Rules and on February 13, 1969, the challenge to said ballot was sustained, and the Regional Director issued a Supplemental Decision and Certification of Representative, in Case No. 17-RC-5874 certifying the Union as the representative for the purposes of collective bargaining for Respondent's employees in the appropriate unit. On February 26, 1969, Respondent filed a request for review of the Reginal Director's Supplemental Decision and Certification of Representative in Case No. 17-RC-5874. The Regional Director for Region 17 declined to consider the Respondent's request for review as a motion for reconsideration, and on March 7, 1969, the Board denied the Respondent's request for review.

The Complaint Case

On March 18, 1969, the Union filed a charge in Case No. 17-CA-3836-1 alleging that since on or about February 5, 1969, the Respondent had refused to bargain with the Union as the duly designated representative of a majority of the employees in the unit found appropriate in Case No. 17-RC-5851, and thus had violated Section 8(a)

(1) and (5) of the Act. Also on March 18, 1969, the Union filed another charge, in Case No. 17-CA-3836-2, alleging that since on or about February 26, 1969, the Respondent had refused to bargain with the Union as the duly designated representative of a majority of the employees in the unit found appropriate in Case No. 17-RC-5874 in contravention of the Regional Director's Decision in Case No. 17-RC-5874 and thus had violated Section 8 (a)(1) and (5) of the Act.

On April 11, 1969, the General Counsel, by the Regional Director for Region 17, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in these cases alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request in the two units. In due course, on April 24, 1969, the Respondent filed its Answer to the Complaint in which it admitted certain allegations of the complaint and denied others.

In its Answer, the Respondent admitted the following allegations of the complaint: (1) filings and service of the charges, (2) certain jurisdictional facts, (3) that the Union is a labor organization within the meaning of Section 2(5) of the Act, (4) the facts of the representation proceedings cited above including the appropriateness of each unit, (5) the Union's requests to bargain collectively and the Respondent's refusal. Respondent further admitted that it has continued to refuse to recognize and bargain with the Union and admitted that its sole objective in so doing is to test the validity of the Regional Director's respective certifications of representative in Cases Nos. 17-RC-5851 and 17-RC-5874, by means of Board review and court decision. Respondent admitted the fact of the election and certification, but denied the validity of

the election and certification, asserting with regard to the unit in Case No. 17-RC-5851 that the employer's operation is seasonal and that the election was conducted at a time when the work complement was approximately only 50 percent of the peak season complement, and further asserting with regard to the election in Case No. 17-RC-5874, that the challenge to the ballot which affected the results of the election, was improperly sustained. Respondent, in sum, denied that it is engaging in any unfair labor practices affecting commerce.

Under date of May 2, 1969, received May 5, 1969, counsel for General Counsel filed a Motion for Summary Judgment, in which he contends that the pleadings, considered together with the official Board record in the underlying representation proceedings in Cases Nos. 17-RC-5851 and 17-RC-5874, raise no factual issues requiring a hearing, that Respondent's Answer alleges no newly discovered evidence or evidence not available at the time of the representation proceedings, and that, as a matter of law, Respondent has no valid defense to the complaint.

On May 6, 1969, I issued an Order on the General Counsel's Motion for Summary Judgment, returnable May 23, 1969, directing the parties to show cause as to whether or not General Counsel's Motion should be granted. The order stated *inter alia* that "if no response disclosing material unresolved issues litigable before and requiring hearing by a Trial Examiner is filed by May 23, 1969, the Motion for Summary Judgment may be granted forthwith." No responses were received to the Order.

Ruling on Motion for Summary Judgment

In its Answer, Respondent contends that its refusals to bargain collectively are fully justified because the

Union has been illegally certified as the bargaining representative for the units involved herein. Respondent asserts that the election in the unit involved in Case No. 17-RC-5851 was conducted at a time of the year when the work complement was approximately 50 percent of the peak season's complement, and that the employer's operation in said unit is seasonal in nature. Further, Respondent asserts that the challenge to the ballot, affecting the results of the election in the unit involved in Case No. 17-RC-5874, was improperly sustained.

With regard to Case No. 17-RC-5851, the question of the size of the appropriate unit was ruled on by the Regional Director in his Decision and Direction of Election, dated November 26, 1968, at page three thereof, and at that time Respondent's contention that since its operation is seasonal in nature no election should be held until the spring of 1969 when it was to add additional employees, in keeping with its practice, was rejected. With regard to Case No. 17-RC-5874, the issue of the challenged ballot was decided by the Regional Director in the Supplemental Decision and Certification of Representative, dated February 13, 1969. Respondent's request for review in Case No. 17-RC-5874 was denied by the Board on March 7, 1969. Respondent's contentions were thus fully litigated and decided in the prior representation proceedings and Respondent has offered no new or previously unavailable evidence to support its present assertions.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related rep-

resentation proceeding.[2] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised;[3] and that there are not such issues here has been effectively decided by the Board.

In the representation proceedings, the Respondent presented, or had opportunity to present, all its present contentions concerning the validity of the election and the certification. The Respondent is thus seeking to relitigate the Board's determinations in the representation proceedings. There being no unresolved matters requiring an evidential hearing, the Motion of the General Counsel for Summary Judgment is granted, and I hereby make the following further:

Findings and Conclusions

I. The Business of the Respondent

Farmers Union Co-operative Business Association is, and has been at all times material herein, a Kansas corporation with its principal place of business at Holton, Kansas. It operates grain elevators at Holton, Valley Falls, and Mayetta, and a feed mill at Denison, also in Kansas. It also operates petroleum service stations at Holton and Denison, a fertilizer department and store at Holton, and a petroleum bulk plant at Denison.

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2. *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71; *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enf'd 379 F. 2d 517 (C.A. 7, 1967), cert. den. 389 U.S. 1041; *N.L.R.B.* v. *Macomb Pottery*, 376 F. 2d 450 (C.A. 7, 1967). See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); NLRB Rules and Regulations, Section 102.67(f) and 102.69(c).

3. *O. K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F. 2d 74 (C.A. 5, 1961). See *Air Control Window Products, Inc.*, 355 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F. 2d 821, 826 (C.A. 4, 1967).

In the course and conduct of its business, the Respondent annually sells and distributes products, the gross value of which exceeds $500,000. The Respondent annually receives goods valued in excess of $50,000 transported to its place of business in interstate commerce directly from states of the United States other than the State of Kansas. Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

With regard to Case No. 17-RC-5851, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Farmers Union Co-operative Business Association at its Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen, truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.

With regard to Case No. 17-RC-5874, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office clerical employees of Farmers Union Co-operative Business As-

sociation, EXCLUDING all other employees and professional employees, guards, and supervisors within the meaning of the Act.

On December 31, 1968, a majority of Respondent's employees in each unit designated and selected the Union as their collective-bargaining representative in secret-ballot elections conducted under the supervision of the Regional Director of Region 17 of the National Labor Relations Board. On January 15, 1969, the Regional Director certified the Union as the collective-bargaining representative for the unit of employees designated in Case No. 17-RC-5851 and on February 13, 1969, the Regional Director certified the Union as the collective-bargaining representative for the unit of employees designated in Case No. 17-RC-5874. From January 15, 1969 in Case No. 17-RC-5851 and from February 13, 1969 in Case No. 17-RC-5874, and at all times since, the Union has been the collective-bargaining representative of a majority of the employees in the above-mentioned units and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about January 22, 1969, the Union requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of the employees in the unit found appropriate in 17-RC-5851. On or about February 5, 1969, and at all times since, Respondent has refused to bargain collectively with the Union.

On or about February 26, 1969, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and

conditions of employment of the employees in the unit found appropriate in Case No. 17-RC-5874. On or about February 27, 1969, and at all times since the Respondent refused to bargain collectively with the Union.

By these refusals to bargain with the Union, the duly designated representative of the employees in each unit, Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) of the Act and is interfering with, restraining and coercing its employees in violation of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the effective period of the certification, the initial year of certification shall be deemed to begin on the date(s) the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units.[4]

B. Farmers Union Co-operative Business Association, Holton, Kansas, its officers, agents, successors and assigns, shall:

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4. The purpose of this provision is to ensure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 382 F. 2d 600 (C.A. 5); *Barnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965), cert. denied 379 U.S. 817 (1964).

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

> All production and maintenance employees of Farmers Union Co-operative Business Association at its Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.
>
> All full-time and regular part-time office clerical employees of Farmers Union Co-operative Business Association, EXCLUDING all other employees and professional employees, guards and supervisors within the meaning of the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in the said appropriate units as the exclusive collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of the employees in the appropriate units with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at all its locations in Holton, Denison, Mayetta, and Valley Falls, Kansas, copies of the attached no-

tice marked "Appendix."[5] Copies of said notice, on forms to be furnished by the Regional Director for Region 17, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from receipt of this recommended Order, what steps it has taken to comply herewith.[6]

Dated at Washington, D.C.

/s/ Charles W. Schneider
Charles W. Schneider,
Trial Examiner

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5. In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

6. In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL NOT refuse to bargain collectively with the AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO, as the exclusive collective-bargaining representative of all our following employees:

> All production and maintenance employees at our Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen, truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.
>
> All full-time and regular part-time office clerical employees EXCLUDING all other employees, and professional employees, guards, and supervisors within the meaning of the Act.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as exclusive collective-bargaining representative of the employees

in the appropriate units and if an understanding is reached we will sign a contract with the Union.

Farmers Union Co-operative
Business Association
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice may be directed to the Board's Regional Office, 610 Federal Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. 374-5181).

APPENDIX B

D-3241
Holton, Kansas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 17-CA-3836-1
17-CA-3836-2

FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO

Decision and Order

On July 9, 1969, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in

certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order, the Recommended Order of the Trial Examiner and hereby orders that Respondent, Farmers Union Co-operative Business Association, Holton, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., September 5, 1969.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member
National Labor Relations Board

(Seal)

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JACKSON FARMERS, INC. (FORMERLY FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION),
Respondent.

No. 43-70

On Application for Enforcement of an Order of the National Labor Relations Board

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(Filed September 30, 1970)

Janet Skaare Morris (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott Moore, Attorney, National Labor Relations Board) for Petitioner.

William G. Haynes of Eidson, Lewis, Porter & Haynes for Respondent.

Before JONES,* BREITENSTEIN, and HOLLOWAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this proceeding to enforce an order of the National Labor Relations Board, the respondent, Jackson Farmers, Inc., refused to bargain in order to test the validity of the certification of collective bargaining units. The Board found that the Company had violated § 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1). See 178 NLRB No. 56.

In various Kansas small towns the Company operates grain elevators, gasoline service stations, and a feed mill. The American Federation of Grain Millers, AFL-CIO, petitioned for representation elections in two separate units of the Company's employees. These were (1) a unit of production and maintenance employees including truck drivers and service station workers, and (2) a unit of office clerical workers. After a hearing the Regional Director issued a decision and directed an election in each unit. The Company's petition for review of the Director's action was summarily denied by the Board. The production and maintenance employees voted in favor of the Union. The outcome of the election held for the clerical employees depended on one challenged ballot, that of Imogene Kinast, the wife of a supervisor. The Director sustained the challenge with the result that this election also went for the Union. The Board summarily rejected the Company's petition for review of the Director's decision on the challenged ballot.

The Company refused to recognize the Union and to bargain with it. Subsequently, unfair labor practice

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*Of the Fifth Circuit, sitting by designation.

charges were brought. The Company defended on the grounds of invalidity of the certification of the production and maintenance unit, the timing of the election so as to prevent voting by seasonal employees, and the ruling on the challenged ballot. The Board sustained the General Counsel's motion for a summary judgment.

The Company argues that it is entitled to a plenary review by the Board of the correctness of the Director's representation determinations before the Board can entertain an unfair labor practice charge based on those determinations. The Board says that the contention was not presented to it and accordingly cannot be considered by the reviewing court. The Company urged before the Board that it was entitled to a new hearing on the representation issues. We need not consider whether the request for a hearing was sufficient to preserve the point because we recently decided in Meyer Dairy, Inc. v. National Labor Relations Board, 10 Cir., ... F.2d ....., that the limited review provided by 29 CFR § 102.67 applies to Board review of any delegated action of a regional director. In so holding we rejected Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board, 2 Cir., 409 F.2d 676, and followed the rule announced in National Labor Relations Board v. Magnesium Casting Company, 1 Cir., ... F.2d ..... See also National Labor Relations Board v. Gold Spot Dairy, Inc., 10 Cir., ... F.2d ..... The Company does not assert that it has any newly discovered or previously unavailable evidence or that it was prevented from presenting any substantial and material evidence at the representation proceedings. In our opinion the Board summary judgment disposition was proper.

The Board has a wide discretion in determining an appropriate bargaining unit and its decision will be set aside only upon a showing that it is capricious or arbitrary. See § 9(b) of the Act; National Labor Relations Board v.

Dewey Portland Cement Company, 10 Cir., 336 F.2d 117, 119; and National Labor Relations Board v. Groendyke Transport, Inc., 10 Cir., 372 F.2d 137, 140. The representation decisions of a regional director, if not set aside by the Board, are entitled to the same weight as a Board decision. Meyer Dairy, Inc. v. National Labor Relations Board, supra, and National Labor Relations Board v. Magnesium Casting Company, supra.

The Company objects to the inclusion within the production and maintenance unit of service station attendants and a bulk-tank driver because they engage in separate and distinct activities and have no common interest with the others in the unit. The Director found that there was some interchange of work, that all received the same fringe benefits, that there was common supervision, and that there was frequent contact among employees. He concluded that the community of interest was sufficient to warrant inclusion within the unit. On the record presented the unit determination was not arbitrary or capricious and must be sustained. See Mountain States Telephone and Telegraph Company v. National Labor Relations Board, 10 Cir., 310 F.2d 478, 479-480.

Because of the seasonal nature of its operation the Company contends that the Director erred in not deferring the election until the spring when additional workers would be employed. The test of eligibility of seasonal employees to participate in a representation election is "whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a bargaining agent." National Labor Relations Board v. George Groh and Sons, 10 Cir., 329 F.2d 265, 268. The Director held that community of interest of seasonal employees depends on reasonable prospect of re-employment from year to

year. The Company does not challenge this ruling. Applying this test, the Director found that the seasonal employees at the Mayettta location had a reasonable expectancy of re-employment and permitted them to vote. The Company now urges that seasonal employees at its Holton location should have been permitted to vote. We find nothing in the record relating to the rehiring of Holton seasonal employees. In our opinion the Director did not act arbitrarily or capriciously in declining to defer the election.

The outcome of the election in the clerical worker's unit depended on the challenge to the ballot cast by Imogene Kinast, the wife of the Company's general manager. The Director found that the work hours of Mrs. Kinast were "clearly tailored to her personal and family needs" and that she "enjoys a special privileged status as an employee of the Employer because of her marital relationship to the Employer's general manager." The challenge to her ballot was sustained.

The record justifies the finding of special status. Although one who is the wife of the general manager is not within the § 2(3) exclusion from the definition of "employee" of "any individual employed by a parent or spouse," we are of the opinion that in the exercise of its discretion under § 9 the Board may exclude from a bargaining unit an employee who is related to a member of management, but not an owner, and who is granted special privileges. Uyeda v. Brooks, 6 Cir., 365 F.2d 326, 329. In the circumstances presented the rejection of Mrs. Kinast's ballot was not arbitrary or capricious.

The order will be enforced.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS, BOARD,
Petitioner,

v.

JACKSON FARMERS, INC. (formerly FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION),
Respondent.

No. 43-70

Judgment

(Filed October 26, 1970)

Before: JONES*, BREITENSTEIN, and HOLLOWAY, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Jackson Farmers, Inc. (formerly Farmers Union Co-Operative Business Association), its officers, agents, successors, and assigns on September 5, 1969. The Court heard argument of respective counsel on July 7, 1970, and has considered the briefs and transcript of record filed in this cause. On September 30, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding

*Of the Fifth Circuit, sitting by designation.

be enforced, and that the Respondent, Jackson Farmers, Inc. (formerly Farmers Union Co-Operative Business Association), its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ Jean S. Breitenstein
Judge, United States Court of Appeals for the Tenth Circuit

DATED: October 26, 1970

APPENDIX E

Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

3(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, ex-

cept that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

8(a)(5) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Hearings on questions affecting commerce; rules and regulations

9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Reduction of testimony to writing; findings and orders of Board

10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or

discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Petition to court for enforcement of order; proceedings; review of judgment

10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its

member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such

temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

C.F.R. 102.67 (c) and (d)

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to paragraph (c) (2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1123

JACKSON FARMERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the same basic question involved in *National Labor Relations Board* v. *Magnesium Casting Co.*, 427 F. 2d 144 (C.A. 1), No. 370, this Term, certiorari granted, October 12, 1970. The issue is whether the Board is required to give plenary review to a regional director's representation determination before entering an unfair labor practice order based on that determination. Here, as in *Magnesium Casting*, the regional director determined appropriate bargaining units for the purposes of conducting representation elections. The Board denied petitioner's request that it review the director's representation determination.

413-991—71

When petitioner refused to bargain, an unfair labor practice proceeding ensued; the Board again turned down plenary consideration of the director's representation determination, and upheld its trial examiner's summary judgment that petitioner refused to bargain in violation of Section 8(a)(5) of the Act. On the Board's petition for enforcement, the Tenth Circuit followed the First Circuit's decision in *Magnesium Casting*, as it had in its earlier opinion in *Meyer Dairy, Inc.* v. *National Labor Relations Board*, 429 F. 2d 697, and ruled that the Board need not give plenary review to the director's representation determination.

Although these circumstances customarily would suggest that this Court defer action on the instant petition until its decision in *Magnesium Casting*, the issue now presented was not raised before the Board. In *Magnesuim Casting*, the employer specifically challenged the propriety of the Board's refusal to grant plenary review of the director's representation determination in either the unfair labor practice proceeding or the representation proceeding. In contrast, in this case petitioner urged only that it was entitled in the unfair labor practice proceeding to an evidentiary hearing on its contentions respecting the propriety of the elections conducted by the regional director (Pet. App. A5). The raising of this quite distinct issue[1] was insufficient to apprise the Board that peti-

[1] In *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, the court emphasized that its decision did not require the Board "to grant a hearing *de novo* on a proceeding properly delegated

tioner desired it to review the representation determination before issuing an unfair labor practice order.[2] Accordingly, judicial review of the question whether the Board was required to grant plenary review, as distinct from a *de novo* evidentiary hearing, is foreclosed under Section 10(e) of the Act.[3] *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. See *National Labor Relations Board* v. *Brush-Moore Newspapers, Inc.*, 413 F. 2d 809 (C.A. 6), No. 665, 1969 Term, certiorari denied, 396 U.S. 1002.

In these circumstances, the petition should be denied irrespective of the outcome of *Magnesium Casting*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JANUARY 1971.

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to a Regional Director," but only "to review what that official has decided and to make its own determination as to whether the Regional Director's decision was right". 409 F. 2d at 681–682.

[2] The court below found it unnecessary to "consider whether the request for a hearing was sufficient to preserve the point" because of its recent decision in *Meyer Dairy* sustaining the procedure utilized by the Board (Pet. App. A18).

[3] That section, in relevant part, provides: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No such circumstances exist here.

U.S. GOVERNMENT PRINTING OFFICE